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Nos. 850-851 and 855

IN THE

Supreme Court of the United States

October Term, 1956

PHILLIPS PETROLEUM COMPANY, *Appellant*,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and NATURAL GAS PIPELINE COMPANY OF AMERICA, *Appellees*.

PHILLIPS PETROLEUM COMPANY, *Appellant*,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and MICHIGAN-WISCONSIN PIPE LINE COMPANY, *Appellees*.

PHILLIPS PETROLEUM COMPANY, *Appellant*,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

On Appeal from the Supreme Court of the State of Oklahoma

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

Supreme Court of the United States

October Term, 1956

No. 953

PHILLIPS PETROLEUM COMPANY, *Appellant*,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and NATURAL GAS PIPELINE COMPANY OF AMERICA, *Appellees*.

No. 954

PHILLIPS PETROLEUM COMPANY, *Appellant*,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and MICHIGAN-WISCONSIN PIPE LINE COMPANY, *Appellees*.

No. 955

PHILLIPS PETROLEUM COMPANY, *Appellant*,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and PANHANDLE EASTERN PIPE LINE COMPANY, *Appellees*.

On Appeal from the Supreme Court of the State of Oklahoma

BRIEF IN OPPOSITION TO MOTION TO DISMISS

STATEMENT

Since the filing of these appeals this Court has noted probable jurisdiction in the case of *Cities Service Gas*

Co. v. *State Corporation Commission of Kansas, et al.*, No. 797, October Term, 1956, wherein the same substantive issue is raised, i.e., the power of a state, in the face of the Natural Gas Act (15 U.S.C. § 717 et seq., 52 Stat. 821) and the jurisdiction of the Federal Power Commission thereunder, to fix the minimum price at the wellhead of gas sold by the producer in interstate commerce for resale for ultimate public consumption.

The *Cities Service* appeal and these appeals, together with the appeal of *Michigan-Wisconsin Pipe Line Co.* v. *Corporation Commission*, No. 809, October Term, 1956, being an appeal from one of the same orders appealed from herein and raising the same issue, should be heard and considered together.

It would be an anomaly for this Court to herein sustain the power of the State of Oklahoma to fix the minimum wellhead price of gas sold in interstate commerce for resale for ultimate public consumption by summarily dismissing these appeals after having noted probable jurisdiction in the Kansas appeal. It would be an anomaly compounded if, after thus affirming the order of the appellee Corporation Commission and such order thereby becomes final, this Court in the Kansas appeal should hold that the state is without power to make such an order.

The various points raised by appellee will be discussed under the proposition number under which each was presented in the motion to dismiss.

I.

The Federal Questions Sought to be Reviewed Were Timely Raised and Passed Upon

Appellee's Proposition I that the federal questions herein sought to be reviewed were not timely raised and passed on, as is true with respect to the whole of its motion to dismiss, is based on the false premise that the minimum gas price order was divided into several separate parts, one dealing with wellhead sales, one with sales after gathering, and one with sales of residue gas after processing, and that the questions heretofore raised and decided were limited to only the so-called "residue" portion of the order.

In the first place, the gas price order was not so divided into separate and different parts but was an interrelated and interdependent whole. This is demonstrated by even the most casual reading of the three sentences comprising Paragraph No. 1 of the order portion of the order (see page 12a of Appendix "C" of appellant's Jurisdictional Statement). The first sentence provides for a specific minimum price or its equivalent, measured at the wellhead, for all gas produced from the Guymon-Hugoton Field, *regardless of where sold or utilized.* The other two sentences merely provide the formula or mechanics for computing the equivalent of the *wellhead* price where the gas is not sold at the wellhead. The last two sentences are not complete, independent and separate thoughts but each is dependent upon and but an incident to the first sentence, which is the substantive portion of the order and refers to *all* sales and not just sales at the wellhead.

The *entirety* of the order is further demonstrated by the Commission's Findings of Fact Nos. 11 and 14 (see pages 10a and 12a of Appendix "C" of appellant's

Jurisdictional Statement) upon which the last two sentences of Paragraph No. 1 of the order are based. Such findings are to the effect that the formula so provided is necessary as an aid to determine whether a price received elsewhere than at the wellhead is the equivalent of the minimum wellhead price fixed by the order. The findings show that the whole of the order, including the two sentences referring to sales after gathering and of residue, provides for and relates to a basic "*wellhead*" *price* for *all* gas, no matter where sold, with, as before stated, the formula added to determine the equivalent of such price where the gas is sold elsewhere than at the wellhead.

This is what the appellee Corporation Commission told the Supreme Court of Oklahoma in its answer brief in the *Panhandle Eastern Pipe Line Company* case, No. 35734, wherein appellee at page 12 said:

> "The Commission's order *did not fix the price of residue gas.* The Commission's order *did not fix a charge for gathering gas.* The Commission's order *did fix a price at the wellhead* for gas produced from the field and provided that no gas be produced unless sold at the well at that price, or unless *that price* be realized if not sold at the well. Since a substantial portion of the gas is not sold at the wellhead, *means for determining the realized price* had to be provided and the Commission's order *implemented the fixing of a wellhead price* by specifying an equivalent price if the gas was not sold until after it had been gathered or gathered and processed." (Emphasis supplied)

Thus it is that although it so happened that in the three former appeals the appellants purchased only residue gas, nevertheless since the order is not divisible but rather relates in its entirety to and is predicated

upon a basic wellhead price, of necessity the entire order was in issue.

Nor does appellant interpret the Court's opinion in the former appeals as being limited in its scope and effect to only a part of the gas covered by the order. In principle and effect the decision relates to and controls *all sales of gas* sold in interstate commerce for resale for ultimate public consumption and over which the Federal Power Commission has jurisdiction, whether sold at the wellhead, after gathering or as residue.

In its Jurisdictional Statement appellant has shown that the questions herein sought to be reviewed were raised and that appellant acted timely.

Appellant did not originally appeal from but instead supported the appellee's order as originally promulgated for two good reasons. First, because under the decisions by this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 U.S. 190, the appellant believed that appellee had the authority to enter the gas price order. Second, the order as drawn and originally promulgated by the appellee applied to all gas produced from the Guymon-Hugoton Field, no matter where sold, and provided appellant with the means of determining and obtaining the equivalent of the wellhead price for its gas sold or utilized elsewhere than at the wellhead, with the result that appellant was not injured thereby. Indeed, under these circumstances appellant could not have appealed. *Corning* v. *The Troy Iron and Nail Factory*, 56 U.S. 451, 465; *Crawshay* v. *Souter*, 73 U.S. 739.

It was not until the decision by this Court in the former appeals herein that it was first and finally de-

termined that the appellee was without authority to make the order because of the Natural Gas Act and the jurisdiction of the Federal Power Commission thereunder, and it was not until the Supreme Court of Oklahoma refused to comply with this Court's mandate and entered its order setting aside the gas price order *only* "insofar as sales of residue gas * * * under existing gas purchase contracts are concerned" that the appellant was for the first time stripped of the protection of the gas price order as originally drawn and for the first time became aggrieved.

It was then that appellant promptly raised and urged in the court below *all of the questions here presented,* both on petition for rehearing, by briefs in support thereof and oral argument thereon.

Although the court below did not enter a formal opinion in the matter, it effectively passed on such questions by denying appellant's petition for rehearing after having heard and considered the questions so raised. The dissenting opinion of one of the justices to the order of the court denying appellant's petition for rehearing (see Appendix "B" of appellant's Jurisdictional Statement) shows that the questions were raised and considered.

The court below in its orders herein complained of and which only partially reversed the gas price order of the appellee shows that in entering such orders it was laboring under the false impression that the opinion and mandate of this Court directed and required a partial reversal in that the court recites that "in conformity with the mandate and opinion of the Supreme Court of the United States, it is ordered as follows:" (see Appendix "A" of appellant's Jurisdictional Statement). The gas price order of the appellee as thus amended by the Supreme Court of

Oklahoma and which as so amended provides only a wellhead price without any formula or means of applying it to residue sales is an entirely different order from that originally promulgated by the appellee and an entirely different order from that previously in litigation. It is an order which appellee had found and had previously said could not be made effective and would be discriminatory.

Appellee in its joint brief with appellant in the former appeals to this Court, in referring to its order and to the facts and circumstances pertaining thereto, at pages 26 and 27 said:

> "The evidence before the Corporation Commission showed that *most gas* in the Guymon-Hugoton Field *is not sold at the wellhead* (R. 135). It also showed that *much of the gas which is not sold at the wellhead is processed by the producer* for the extraction of liquid hydrocarbons and that the *residue* is then sold during or at the conclusion of gathering (ibid). The Commission found that '*a minimum price order cannot be made fully effective and discrimination prevented without a means provided for determining the manner in which the amount* [*may be*] *realized for gas by producers operating gathering and processing plants*' (R. 136). Appellant does not challenge the evidence or this finding.
>
> "In the light of this evidence and finding the Corporation Commission *had* to adopt some formula *to be applied to gas sold away from the wellhead* and after processing as is the situation in the case of the sales by Panoma to appellant. *Otherwise no minimum price order in the Guymon-Hugoton Field could be effective.* The formula which the Commission did adopt is neither arbitrary nor unreasonable. *It is unrealistic to view it*, as appellant does, *as if it were some form of price regulation apart from and performing a*

different function from the one performed by the rest of the order.

"The order in its entirety, including the formula relating to sales made after gathering and processing, is a regulation of production." (Emphasis supplied)

At page 16 of the same brief appellee told this Court:

"The Corporation Commission found, and it is not questioned here, that the formula established in the present order *was necessary to the achievement of the purpose of the order.*" (Emphasis supplied)

Thus it is that the Supreme Court of Oklahoma, thinking that it was acting "in conformity with the mandate and opinion" of this Court, has by the orders now appealed from promulgated a new legislative order for the Corporation Commission which appellee itself previously found and said it would not have entered, one that applies to only a small part of the gas in the field and one that is discriminatory and cannot be made fully effective.

This Court should assert its jurisdiction herein, review its mandate and by a further opinion and mandate correct the erroneous interpretation by the Oklahoma Supreme Court of the former opinion and mandate herein. Or, in the alternative, this Court should review the new order as made by the judgments of the Oklahoma Supreme Court partially reversing the causes and should hold such order to be invalid.

Appellee at pages 8 and 9 of its motion to dismiss cites cases holding that a decision on appeal becomes the law of the case and that none of the questions before the Court are open for reconsideration on subsequent appeal. Such principle has no application here. Ap-

pellant is not asking that any question before the Court on former appeal be reconsidered and decided differently but rather that the decision and mandate of the Court in the former appeals be given effect.

At pages 12 and 13 of its motion to dismiss appellee contends that the invalidity of what appellee calls the "wellhead part" of its order was not urged in the original appeals in either the Oklahoma Supreme Court or this Court and cite cases holding that this Court will not decide questions the court below did not decide. Appellant has heretofore pointed out that there was originally no "wellhead part" of the order as promulgated by the appellee and why appellant did not in the original appeals attack the order as so constituted. That order, however, as amended by the partial reversal thereof by the Supreme Court of Oklahoma and which is now appealed from is an entirely different order. As disclosed by the record in these appeals, the questions *here raised* with respect to the order as so amended were presented to, considered and decided by the court below. It is from the action of the Oklahoma Supreme Court thereon that these appeals are taken.

In its motion to dismiss (page 14) appellee contends that the record herein does not include the necessary facts to decide the questions here presented, particularly whether the sales of gas by independent producers at the wellhead are sales in interstate commerce for resale for public consumption and whether, if such sales are in interstate commerce for resale for public consumption, they are within the production and gathering exemption of Section 1(b) of the Natural Gas Act. This is not true with respect to the gas produced from the Guymon Hugoton Field and particularly with

respect to the gas produced and purchased by appellant. The record here on appeal includes all of the material portions of the transcript of proceedings and evidence originally before the appellee Corporation Commission upon which the price order in its entirety was based, which includes not only ample evidence with respect to the operations, production, sale and disposition of gas by appellant but also ample evidence with respect to the production and disposition of gas generally in the Guymon-Hugoton Field. The evidence shows conclusively, about which there can be no dispute, that all of the gas produced and purchased by appellant is immediately transported in interstate commerce and sold for resale for ultimate public consumption (transcript of record on former appeals, pp. 64, 65, 71-74). No other facts are needed. Moreover, the same identical gas produced, purchased and sold by appellant was involved in the cases of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, *Phillips Petroleum Co.* v. *Oklahoma*, 340 U.S. 190, and *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, wherein the facts setting out the production and purchase of gas by appellant at the wellhead and its transportation thereof into the State of Texas for processing and resale to interstate pipe line companies are set out in detail. This Court will take judicial knowledge of the records in those cases. *United States* v. *Pink*, 315 U.S. 203.

In its motion to dismiss (page 15) reference is made to certain pending Court of Appeals cases by appellee, stating that "the question of whether wellhead sales constitute interstate commerce and, if so, whether such sales are exempt under the production and gathering exemption" of the Natural Gas Act is in issue therein and that the Federal Power Commission is a party in those cases. Although appellant is not completely

familiar with the record in those pending cases, it is appellant's understanding that they do not involve any order of a state attempting to regulate wellhead prices but are concerned only with the details of the Federal Power Commission's jurisdiction over wellhead sales.

It should be pointed out that just as the parties to those pending appeals are not parties hereto, the appellant and appellees herein are not parties to those pending appeals. If the Court were to grant appellee's motion for dismissal and then later the Court of Appeals in those pending appeals holds that the Federal Power Commission had exclusive jurisdiction, the appellant would then be without recourse in respect to the order here in question inasmuch as it would then be final and no appeal could be taken. Appellant submits that it is entitled to have the questions in these appeals determined on the record herein, which is adequate for that purpose.

Appellee at page 17 of its motion to dismiss argues that there is no conflict between the minimum gas price order here involved and the regulations of the Federal Power Commission by urging judicial notice of the fact that pursuant to Federal Power Commission regulations producers in the Guymon-Hugoton Field have been permitted to file as their June 7, 1954 prices the minimum price of 9.8262¢ as fixed by the gas price order rather than their contract prices, which prices were accepted by the Federal Power Commission. Although the orders of the Federal Power Commission allow the producers a rate which is equivalent to the minimum price fixed by the Commission order and in effect on a certain date, nonetheless such orders of themselves show that the Federal Power Commission

is actually and in fact exercising jurisdiction over wellhead sales and wellhead prices of natural gas in the Guymon-Hugoton Field and that as a result there is a *conflict of jurisdiction* between the Federal Power Commission and the appellee even though particular orders may not at a particular time bring about conflict. It was such a conflict of jurisdiction that this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and in its opinion in the former appeals herein said could not exist. Therein this Court repudiated the argument that there can be no conflict of jurisdiction until the Federal Power Commission fixes a rate lower than the minimum price specified by the Oklahoma Corporation Commission.

At page 18 of its motion to dismiss appellee contends that what it calls the "wellhead portion" of the present gas price order, except for amount, is identical to the 7¢ order in the case of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, which the Court in that case sustained and for that reason the so-called "wellhead portion" of the present order should be sustained. As pointed out by this Court in its opinion on former appeal herein, the *Cities Service* case was decided solely on the basis of the constitutional questions as limited by the parties to that litigation and did not pass upon the question of the effect of the Natural Gas Act and the jurisdiction of the Federal Power Commission thereunder upon the validity of the 7¢ order. It was this question that was decided by this Court in these cases adversely to the contention of the appellee.

Whereas the appellee now contends that only the so-called "wellhead portion" of the 9.8262¢ order is identical to the 7¢ order in the *Cities Service* case, in the

former appeals it represented to this Court that the whole of the two orders is substantially identical (see Joint Brief of Appellees, *Natural Gas Pipeline Company of America* v. *Corporation Commission of the State of Oklahoma, et al.*, No. 321, October Term, 1954, at page 16). It there said that "the only difference between the two orders, therefore, is that the order challenged in this case makes explicit what was true by construction of the order upheld in the *Cities Service* case." This Court in *Phillips Petroleum Co.* v. *Oklahoma*, 340 U.S. 190, in effect held that the prior 7¢ order applied to all sales, including residue sales, by appellant and hence to that extent was no different from the later 9.8262¢ order. The fact that the decision by this Court on the former appeals herein likewise held invalid the 7¢ order is evidenced by the fact that in its opinion in *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, this Court reversed the judgment of the Oklahoma Supreme Court sustaining the 9.8262¢ order and, for the same reasons, reversed a judgment by the Supreme Court of Oklahoma sustaining an order in favor of Panoma Corporation, which order was based almost completely, if not entirely, upon the original 7¢ order.

It follows and is made clear in the opinion of this Court in the former appeals herein that the difference between its decision in the *Cities Service-Peerless* case and its opinion in these cases was not based upon any difference in effect between the 7¢ order and the 9.8262¢ order as applied to either wellhead sales or sales of residue but the difference lies in the fact that in the present cases involving the 9.8262¢ order the Court considered the question of the Natural Gas Act and the jurisdiction of the Federal Power Commission which was not considered in the *Cities Service* case

because the parties there deliberately refrained from raising the question.

II.

Appellant Is Not Estopped by Its Prior Action From Urging the Issues Herein Raised

Under its Proposition II appellee seeks to leave the impression that the appellant was the prime mover in the promulgation of the gas price order. Such is wholly unsupported by the record and has no factual basis. The applicants for the order were a group of mineral and royalty owners, which fact is clearly shown by the record (transcript of record on former appeals, pp. 9 and 10). The appellant participated in the proceedings because it both produced and purchased large volumes of gas in the Guymon-Hugoton Field. Appellant therefore introduced evidence to show the equivalent wellhead prices for gas that was gathered and processed and sold as residue and recommended a form of order to be utilized if a price order was to be entered by the appellee. However, the record is clear that appellant did not recommend that a gas price order be promulgated. Rather it insisted that if such an order were to be promulgated it must of necessity apply to all gas produced from the Guymon-Hugoton Field, no matter where sold, and to protect the producer and purchaser which gathered and processed and sold the gas as residue, must contain the definitive and protective features of the order as promulgated (transcript of record on former appeals, pp. 79, 82 and 83).

As is pointed out above, appellant believed that under the *Cities Service* and *Phillips* cases the state had the authority to regulate at the wellhead the price of gas sold in interstate commerce so long as the gas price

order was not discriminatory and provided appellant with the means of determining and obtaining the equivalent of the wellhead price for its gas sold or utilized elsewhere than at the wellhead and appellant therefore supported the gas price order in the former appeals. This Court held that the state lacked such authority. However, the appellee and other producers in effect secured a new gas price order from the Supreme Court of Oklahoma. Appellant has at all times and at every opportunity opposed the new order, which is the subject of these appeals. Appellant therefore should not be estopped from following what this Court pronounced as the law with regard to the authority of the states to regulate the wellhead price of natural gas sold in interstate commerce.

III.

The Price Order Promulgated by the Supreme Court of Oklahoma Does Not Rest on an Adequate Non-federal Basis

Appellant's Jurisdictional Statement clearly shows that substantial federal questions are presented in these appeals. Appellee's entire argument under this point is based upon the contention (which we have shown above to be without basis) that the gas price order is separable and that appellant should have foreseen the possibility of the Oklahoma Supreme Court's noncompliance with this Court's mandate and raised the questions herein raised in the former appeals.

Moreover, appellee's argument fails to recognize the principle that one must be aggrieved or injured through a deprivation of his rights in order to have standing to attack the validity of a state statute, and the further related principle that this Court will not decide hypothetical or moot questions. Appellant clearly

raised the federal questions herein sought to be reviewed at the first opportune moment after it became aggrieved.

Appellant does not here assert that the question of separability of a state statute is not one for the state court. Appellee's reference to that question is wholly aside the point. It does not touch upon or answer the federal questions which appellant has raised herein as to the validity of the new, different gas price order in effect promulgated by the Oklahoma Supreme Court on the remand of the former appeals. Furthermore, appellee itself has admitted in its motion to dismiss that there is a conflict between the jurisdiction of appellee and of the Federal Power Commission over wellhead sales in the Guymon-Hugoton Field (see appellee's motion to dismiss at page 17). There can be no doubt that this presents a federal question.

CONCLUSION

Appellant respectfully submits that the motion to dismiss should be denied and that these appeals should be considered and disposed of on the merits along with other appeals involving the same issue.

Respectfully submitted,

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